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IN THE

Supreme Court of the United States

No. 382-383 October Term, 1947.

JESSIE L. O'DANIEL,
Citizen of the State of Tennessee, *Petitioner,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation, Pennsylvania
Respondent,

JESSIE L. O'DANIEL, Executrix of the Will of WILLIAM BRYAN O'DANIEL, deceased,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jessie L. O'Daniel, widow of William Bryan O'Daniel, deceased, and Executrix of the last Will and Testament of William Bryan O'Daniel, deceased, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Two civil actions, with jurisdiction based on diversity of citizenship, were instituted in the Court of the United States for the Eastern District of Pennsylvania by the Petitioner, Jessie L. O'Daniel, widow of William Bryan O'Daniel, deceased, and as Executrix of his last Will and Testament for recovery of damages based on the negligence of Respondent common carrier in starting a train before the Decedent, an intending passenger, had an opportunity to board it, which resulted in his death. (4a)

The accident occurred at the Respondent's railroad station at Ardmore, Pennsylvania. The Decedent was forty-six (46) years of age, had been employed by the General Foods Sales Corporation since January 1st, 1925 and was, at the time of his death, District Sales Manager for the Corporation, with office in the City of Philadelphia. He was in excellent health, strong and agile (29a, 31a, 32a, 33a and 35a).

On the morning of September 28, 1943, he left his home for the Ardmore station of the Defendant to take a commuter's train to his place of business in the City of Philadelphia. The deceased, with commutation ticket on his person (30a), approached the station from the curb adjoining the Pennsylvania Building, moving diagonally toward the Southeast corner of the station, running flat-footedly (16a). He arrived at the South side of the platform near the East end of the station when Miss Vaux heard the whistle to start the train. There is no evidence that any trainman gave any gesture or sound before the train started; or that any person observed any trainman on the platform of any car or of the station when the whistle sounded as the Decedent proceeded at right angles across the station platform, only twenty (20) feet wide (7a), to the train which was then at rest (20a). But Miss Vaux saw no trainman where Decedent stood and attempted to board (17a).

When he reached the edge of the North side of the station platform and was standing a step or two from the South rail (15a, 24a, 25a, 26a), about ten (10) or twelve (12) feet from the rear open platform of the third car from the end of the train, which he later attempted to enter, the train started to move before he had an opportunity to board it (13a, 14a).

The only facts evidentiary of the speed of the train when Decedent attempted to board it are: (a) It had just started to move so slowly that all witnesses refused to guess its negligible speed (20a, 21a, 24a). (b) Decedent waited until the steps came opposite to him, and when it had moved not more than twelve (12) feet, he grabbed the forward stanchion of the rear of the third car and took two steps towards it (15a). (c) The door and the platform of the steps of the car he attempted to board being then open (17a), his body moved with the train for a distance of approximately fifteen (15) feet when he slid down under the train between the open bumpers of the second and third cars from the rear of the train (18a). (d) He was in-

stantly killed; the front wheels of the second rear car severing his body at the waist as it touched the South rail (19a), the body lay at right angles to the rails with head toward the North edge of the station platform or South bound rail, and the feet in the direction toward, but not touching, the North bound rail (19a); and (e) his body was resting under the middle of the last car when the train stopped (19a).

The station platform was three hundred thirty (330) feet long and twenty (20) feet wide at the place where he attempted to board the train (7a); the station building erected thereon was forty (40) feet long and nine and one-half (9½) feet wide; the East end of the station is ninety-seven (97) feet from the East end of the platform (9a); a driveway runs parallel to and alongside of the South side of the platform; and the Pennsylvania Building is on the opposite side of the driveway (8a). The distance diagonally across the driveway from the curb adjoining the Pennsylvania Building to the place at which the deceased entered the South side of the platform is ninety-one (91) feet (11a).

The trainmen had a clear and unobstructed view for a distance of ninety-seven (97) feet along both the North and South sides of the platform to the curb adjoining the Pennsylvania Building (10a). The weather was clear and the platform and roadway dry at the time the Decedent attempted to board the just starting train (17a).

These two civil actions were consolidated for trial in the District Court, the facts and issues involved being identical and, on appeal to the Circuit Court of Appeals for the Third Circuit, the actions were argued and judgment entered on the record made at the trial so consolidated.

The Trial Court, at the close of Petitioner's case, granted Respondent's motion under Rule 50 of the Rules of Civil Procedure and directed the jury to find a verdict in the two cases for the Respondent. The sole reason assigned for such order of the Court was its conclusion of law that the De-

cedent's attempt to board a moving train was negligence *per se* (48a).

Petitioner filed motions to set aside the verdict and to grant a new trial or to set aside the verdict and enter judgment for the Petitioner. The motions were denied and exceptions by the Petitioner were noted to the judgments. On appeal by Petitioner from said definitive judgments, the Circuit Court of Appeals affirmed, for the reasons stated by the Trial Court directing the verdicts for the Respondent. The opinion of the Circuit Court of Appeals ((1947) 162 Federal Reporter (2nd) 414) in full follows:

> "This unfortunate death case is governed by the law of Pennsylvania. In his opinion in the district court denying the plaintiff's motion for new trial Judge Kirkpatrick correctly stated and applied that law. F. Supp.—For the reasons stated in his opinion, which we adopt, the judgment of the district court will be affirmed."

II.

Petition for Rehearing was timely filed and refused by order entered on the 10th day of July, 1947, a copy of which Petition, with copies of Appellant's Brief and Reply Brief, to which references therein are made, are hereunto attached and made a part of this Petition.

III.

The Errors Relied on by Petitioner in the Circuit Court of Appeals were:

(1) The Trial Judge ignored the legal consequences of the Defendant's assumed negligent breach of duty to an admittedly intending passenger, as the proximate cause of

death in relation to Decedent's immediate act, in finding Decedent's contributory negligence as a conclusion of law.

(2) It denied or ignored that the Decedent was confronted with an emergency in contra-distinction to a peril;

(3) It refused to follow the Pennsylvania law as applied by the Supreme Court of that Commonwealth and by the Federal and every state court on essential facts identical with the instant case; and

(4) The Court's conclusions as law of no emergency and of Decedent's contributory negligence on assumptions not in evidence and on doubtful and unfavorable inferences, are in usurpation of the province of the jury to base its verdict on other facts and favorable inferences of Decedent's reasonable conduct in emergency under all the circumstances.

IV.

JURISDICTION.

The original judgment of the Circuit Court of Appeals was entered on the 3rd day of June, 1947; and Petition for Rehearing was refused on the 10th day of July, 1947.

Jurisdiction of this Honorable Court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13th, 1925 (Title 28 U. S. C. Section 347).

V.

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether Decedent's contributory negligence, under all of the facts and inferences, was solely of law for the Trial Court's determination.

(2) May a Federal District Court, in its determination of applicable Pennsylvania law, ignore a decision of the Supreme Court of that Commonwealth never over-ruled or modified, which stated and applied the law of Pennsylvania to essential facts identical with the instant case: That Decedent's contributory negligence must be determined by a jury.

(3) Did Defendant's negligence confront Decedent with an emergency which imposed on him the duty of reasonable conduct under all the circumstances, but relieved him of the consequences of a wrong choice.

(4) The Court having assumed Defendant's negligence to an intending passenger, may it conclude as law, or must a jury on doubtful and conflicting facts and different inferences determine the facts of (a) emergency, (b) of Defendant's proximate negligence in relation to Decedent's immediate act and (c) of Decedent's contributory negligence.

(5) May a Circuit Court of Appeals in affirming a judgment on a verdict under Rule 50 of the Rules of Civil Procedure (a) draw inferences from inferences based on assumptions not in evidence, (b) ignore material facts in evidence and (c) draw unfavorable inferences from facts—if

a jury fairly might find other facts or reasonably draw more favorable inferences.

(6) Whether the Circuit Court of Appeals by adopting the opinion of the District Court erred in sanctioning that Court's departure from the accepted and usual course of judicial procedure in a Federal court.

VI.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner respectfuly assigns as reasons for the issuance of a writ of certiorari the following matters:

(1) The decision of the Circuit Court of Appeals determined a pivotal question of Pennsylvania law contrary to the decisions of the court of last appeal of that Commonwealth.

(2) The decision of the Circuit Court of Appeals is contrary to the law as announced in Erie Railroad Company vs. Tompkins ((1938) 304 U. S. 64, 82 L. Ed. 1188) in that: (a) It intentionally did not consider the entire body of substantive Pennsylvania law applicable to the instant case; and (b) explicitly refused to follow and apply the Pennsylvania law as announced by the Supreme Court of that Commonwealth in the leading case of Johnson vs. The West Chester and Philadelphia Railroad Company ((1872) 70 Pa. 357), which stated the correct rule of local law as applied to the facts of the instant case.

(3) The decision of the District Judge adopted by the Circuit Court of Appeals has interpreted Rule 50 of the Rules of Civil Procedure so as to infringe the Petitioner's constitutional right of trial by jury.

(4) The Circuit Court of Appeals,—in sustaining the District Court's conclusion as law of Decedent's contributory negligence in a case of doubtful and conflicting facts and of different inferences by (a) drawing inferences from inferences based on assumptions not in evidence, (b) ignoring material facts in evidence and (c) drawing the most unfavorable inferences from other facts,—has sanctioned that Court's departure from the accepted and usual course of judicial procedure in such manner as to call for this Honorable Court's power of supervision.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the cases No. 9357 and No. 9358, entitled on its docket "Jessie L. O'Daniel vs. The Pennsylvania Railroad Company, a corporation," and "Jessie L. O'Daniel, Executrix of the Will of William Bryan O'Daniel, deceased, vs. The Pennsylvania Railroad Company, a corporation" and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and for such other relief as the Court may deem proper.

JOHN W. DICKERSON,
RUBY R. VALE,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

These cases in the District Court were reported in 72 Federal Supplement 10 (1947). The opinion of the Circuit Court of Appeals, reported in 162 Federal Reporter (2nd) 414 (1947), is set forth under Summary Statement of Matters Involved on page 4 of this Petition; and reference is respectfully made to the Summary Statement in the Petition for a concise narrative of the essential facts involved and need not here be repeated.

ARGUMENT.

Preliminary Statement of Issues Involved.

This Petition involves some foundations on which trial by jury rests. It presents a case wherein the learned Trial Court's departure from the usual course of judicial procedure involves obvious fundamentals, and so requires the exercise of appellate supervision. An abstract principle of law is postulated as an absolute and here has been conceptually applied. This Honorable Court is now asked to give its ultimate sanction to the absolute: That charges a decedent with contributory negligence as conclusion of law, who as a passenger lost his life while boarding a train, negligently started before he could board it, and moving however slowly.

Nature abhors a vacuum, as the human mind in its search for justice suspects absolutes—the former because of in-

tegrating forces in equilibrium, the latter for the reason of diversity in the realities of life. The only rational warrant for this conceptualism of negligence *per se* is that all minds have concluded the absence of due care, because they observed injury generally followed all attempts to board moving trains under all conditions—a false assumption, since contrary to human experience. It is because of differences in minds, experiences and conduct and of variations of conditions and circumstances that positive law defines negligence as the absence of due care attending the act of the ordinary man under given circumstances.

The absolutes of law are indeed rare; and when enunciated as dogmas of substantive law in tort, they are applied only in the fiction that all minds are in accord as to the right or duty defined or breached. With particular reference to the breach of the duty of due care, every conceptual doctrine, e. g., *negligence per se or res ipse loquitur, is subjected to the judicial scrutiny of time, place, motion and of every circumstance and condition attending its application under the test of unanimity of opinion as to the factual pattern.*

In the reality of facts, let minds differ as to the actual facts or inferences within the scope of the investigation, and no absolute alone has ever been permitted to determine any fact or inference or assumption definitive of liability for negligence. *When there are either doubts or differences as to the facts or the inferences of emergency, proximate cause or as to the standard of due care of an ordinary man,* then only a jury of diverse minds may find the facts or inferences —for in conflict or doubt, the injustice of permitting one mind finally to determine the factual issue is manifest, and obvious as to the foundation reason that makes trial by jury imperative.

The fundamental questions here involved are then:

(1) The existence in Pennsylvania law of an absolute rule of negligence *per se* for a passenger to attempt to board

a train, negligently started before he could mount the steps, and moving however slowly; and

(2) May a Court conclude as law, or must a jury find on doubtful and conflicting facts and different inferences, the facts *of emergency, of Defendant's proximate negligence in relation to Decedent's immediate act and of his alleged contributory negligence.*

This Honorable Court is here not asked to review the weight or sufficiency of evidence for or against any of these three essential facts in issue. The sole questions for its determination are the justice of the *conceptualistic application* as conclusion of law of an *assumed absolute* and the *existence* in this record of *doubtful and conflicting facts and* of different *inferences for a jury's determination.*

The learned Trial Judge did not adopt the suggestion made in 1943 to trial judges by the Second Circuit Court and applied by the Third Circuit in accordance with the Notwithstanding the Verdict Pennsylvania Act of 1905, page 206, No. 198; and discussed by Mr. Justice Black's opinion in Cone vs. West Virginia Pulp and Paper Company ((1947) 67 Sup. Ct. 752):

> That "generally speaking—although there may be exceptions—it is desirable *not to direct a verdict at the close of the evidence*, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence * * * thus avoiding the waste and expense of another trial."

It is respectfully suggested that it only adds burdens to the injustice of wrongfully directing a verdict for Defendant *at the close of Plaintiff's case* without hearing the defense or noting of record its formal waiver, as counsel for the instant Respondent did. See in this connection Federal Rules of Civil Procedure, with Amendments, 1947 Revised Edi-

tion, Section 4 on Directed Verdict under Rule 50b, pages 386 to 389 and Section 5, Judgments Notwithstanding the Verdict, pages 389 to 397.

With this preliminary general statement of the issues raised by the Petition, the several reasons relied on for allowance of the writ as stated in section VI of the Petition will be discussed in the order of their statement.

(1)

IT IS NOT NEGLIGENCE PER SE UNDER THE LAW OF THE COMMONWEALTH OF PENNSYLVANIA FOR AN INTENDING PASSENGER TO ATTEMPT TO BOARD A MOVING TRAIN.

The Circuit Court of Appeals by adopting the District Court's conclusion of the local rule of law, has determined a pivotal question of local law contrary to the local decisions. The reasons stated by the District Court for directing a verdict for the Respondent were (48a):

> "I am bound absolutely by the law of Pennsylvania * * * it is still the law in Pennsylvania that if a passenger or an intending passenger boards a moving train, *it is negligence per se*, and that there can be no recovery."

Both the Supreme and Superior Appellate Courts of Pennsylvania explicitly and uniformly have denied the existence of such rule of law and the learned Trial Court itself has modified the absolute by it first avowed as the sole reason for giving binding instructions—for in its opinion discharging Petitioner's motions it states that a *moving train* "can be boarded without negligence" (58a):

> "It was also argued that it was for the jury to say whether the speed of the train was such as to make it negligent for the plaintiff to attempt to try to get on it

after it started. *Of course, even under the rule, the speed of a moving train may be so slight as to be almost imperceptible, so that it can be boarded without negligence."*

Notwithstanding this disavowal of the absolute rule, the Trial Court persisted in its error and convicted Decedent of contributory negligence alone because he attempted to board a moving train. It utterly ignored the facts following: (a) Respondent's admitted negligence; (b) the train started before Decedent had an opportunity to board it, with speed so negligible that it could not be fixed and had moved approximately only twelve (12) feet when Decedent grabbed the stanchion. It disregarded every other fact and circumstance attending the death, e. g., of (c) *emergency* when Decedent passenger was suddenly confronted with a moving instead of a standing train; (d) the *proximate cause* of the death was Respondent's moving the train before Decedent could board it; (e) *contributory negligence* cannot be predicated on the intermediate act of the Decedent when the *proximate cause was put in motion by the Respondent;* and (f) factual issues of Respondent's negligence, emergency, proximate cause and contributory negligence are for the jury where (g) presumption of *Decedent's due care* exists and either facts or inferences are (h) *in doubt and ordinary men may differ* as to their findings. (See Appellant's Brief, pages 4-16, Appellant's Reply Brief, pages 1-4 and Appellant's Petition for Rehearing and Brief, pages 1-5.)

Applicable Pennsylvania Law.

(a) *Respondent's Negligence.*

The learned court below in effect admitted (49a) Respondent owes the same duty to an intending passenger as to a passenger, that it is negligence to start a train before the

passenger manifestly intending to board it is on it and that no court can say as matter of law the trainmen could not have seen him if they had exercised reasonable care. (See Appellant's Brief, pages 6-8, 11-16, 27-28, Appellant's Reply Brief, pages 1-2.)

The following Pennsylvania cases are here referred to for the convenience of the Court and which clearly establish the duty owed to Decedent, an admittedly intending passenger:

In the case of Hatch vs. Philadelphia and Reading Railroad Company ((1905) 212 Pa. 29), Mr. Justice Brown states the duty which the Petitioner has shown was breached in the instant case, as follows:

> "It is the duty of the crew of a passenger train, the conductor and brakeman having it in charge, to see that all passengers boarding it, *or manifestly intending to board it*, are safely on it before the signal is given to the engineer to start. Failure to do so is negligence, and if a passenger is thrown from the step or platform of a car by the starting of it before he is safely on it, the railroad company is liable for the injuries sustained."

A non-suit was sustained in that case, the facts being in contra-distinction to those of the instant case in that the plaintiff's evidence in the Hatch Case affirmatively showed nothing in his movements or conduct that indicated his intention to become a passenger, but, on the contrary, negatived such idea. Mr. Justice Brown on page 31 says:

> "When he reached the steps leading up to the lawn the train was at the station. *Smoking a cigar he walked leisurely towards it across the lawn in the direction of the last car*, but neither said nor did anything to indicate to the crew, if they saw him, that he intended to get on the train. On the contrary, if they did see him, they saw him slowly *walking in the direction of the last car, but with no indication in his movements that he in-*

tended to become a passenger. By no sign nor word did he give any indication of such an intention."

In Stankowcz vs. Baltimore and Ohio Railroad Company ((1916) 62 Sup. Ct. 125), Mr. Justice Trexler states the rule owed to an intending passenger, with particular reference to the Hatch Case, and the effect of the absence of any affirmative testimony that the trainmen saw the decedent. He says at page 127:

> *"The relation of carrier and passenger began as soon as the plaintiff in good faith and with the intention of becoming a passenger entered in a lawful manner upon the carrier's premises:* Powell v. Philadelphia & Reading Ry. Co., 220 Pa. 638. The standard of duty for the company is 'strictest vigilance'; Bockelcamp v. L.' W. V. R. R. Co., 232 Pa. 66. * * * *It is negligence to start a train before the passengers who are manifestly intending to board it are on it;* Hatch v. Railway Co., 212 Pa. 29. *To use the language in Feiser v. Philadelphia & Reading Ry. Co., 245 Pa. 422, 'the evidence does not show that either the conductor or the brakemen actually saw him, but taking all the facts and circumstances into consideration we cannot say as a matter of law that the employees could not have seen him if they had exercised reasonable care, or that they had no duty to perform in connection with the safety of this intending passenger."*

Chitwood vs. Philadelphia and Reading Railway Company ((1920) 266 Pa. 435) is particularly applicable to the facts of the instant case as to the duty owed to an intending passenger where different inferences may be drawn from the movements and actions of the person injured. The alternatives of liability are clearly stated by Mr. Justice Walling at page 437 with cases cited supporting such alternatives as follows:

> "But defendant's evidence tends to show that the train stopped there about twenty minutes and that apparently all intending passengers, some five in number, were safely on board long before the starting signal was given; and that plaintiff's accident resulted from a belated effort by him to get aboard on the wrong (west) side of the train, while it was in motion, and without his presence being known to any member of the train crew. *The case turned upon which version the jury accepted: if plaintiff's, he could recover* (cases cited), *but if defendant's, he could not* (cases cited). *The verdict was for plaintiff and this appeal by defendant is from judgment entered thereon.*"

In that case, none of the train crew saw the plaintiff as an intending passenger. The Supreme Court reversed and on retrial, a verdict was rendered for the plaintiff and the Supreme Court in 275 Pa. 22 sustained the verdict.

(b) *Circumstances Attending Decedent's Boarding the Train.*

No Evidence of Three or Four Miles per Hour.

The only reason which in the judgment of the District Court made imperative its conclusion as law that Decedent was guilty of contributory negligence follows (58a):

> "In the present case, however, the train, when Mr. O'Daniel attempted to board it, could not have been going *less than three or four miles an hour* because, as he stepped along with it, holding the grabiron, his pace was described as 'probably a little hasty' ".

There is not a word in this record as to the speed of this train going at the rate of three (3) *or four* (4) *miles an hour, or of any speed, or of walking at any pace.* The record is

conclusive, as testified to by Miss Vaux and by Miss McAllister, that he was standing about twelve (12) feet from the steps when the car was at rest, that just as the train started, Decedent "grabbed the stanchion and moved * * * *towards the train,*" when it was moving so slowly that *Miss Vaux could not fix its speed.* The car could not have moved more than twelve (12) feet, and certainly less; *for the Decedent moved towards the steps* when the attempt to board was made, as testified to by both eye witnesses. (See Appellant's Brief, pages 18-20 and Appellant's Reply Brief, pages 5-8, Petition for Rehearing and Brief, pages 2-5.)

Hunterson vs. Traction Company Differentiated.

Hunterson vs. Union Traction Company ((1903) 205 Pa. 568) relied on by the court below to sustain its absolute of negligence *per se*, by a divided court held the plaintiff guilty of contributory negligence who attempted to board a train moving at the rate of three (3) or four (4) miles an hour. But the opinion of the court by Mr. Justice Brown and the dissenting opinion by Justice Mestrezat are not in conflict in their denial of the broad proposition that it is negligence *per se* for one to attempt to board a *moving* train. Both opinions expressly recognize that the *rate* of speed is a determining factor in considering the question of contributory negligence of him who makes the attempt to board. They differ in that the majority opinion held it was *negligence per se under the facts* presented of a train moving at the rate of *three or four miles an hour.* The dissenting opinion held that under this fact and all of the other facts, it was for the jury to determine the question of contributory negligence.

In the Hunterson Case and in every case prior or subsequent to it which held it to be negligence *per se* for a person to attempt to board a train moving at a speed *of more than three or five miles an hour, there was no antecedent negligence on the part of the defendant involved.* The con-

clusion of contributory negligence as matter of law was reached only in such cases wherein *there was no evidence that defendant's negligence had placed the defendant in a position of emergency to make a choice.* There was no proof, as in the instant case, or factual issue raised as to Respondent's moving the train being the *proximate cause* of the injury and not one of the cases presented *either doubt or possible diversity of opinion as to the facts or inferences.*

A review of the cases cited by the Trial Court in support of its conclusion of contributory negligence *per se* will confirm the generalization: *That every of them was a case devoid of prior negligence, as proximate cause, on the part of the defendant and of plaintiff's obvious negligence under undisputed facts free of conflicting inferences.* (See Appellant's Brief, pages 20-24, wherein every case cited by the court is discussed.)

(c) *Emergency.*

Johnson Case Decisive of Pennsylvania Law.

The text books, encyclopedias, commentators and courts of England and every American state hold, in accordance with the leading American case decided by the Supreme Court of Pennsylvania in Johnson vs. The West Chester and Philadelphia Railroad Company ((1872) 70 Pa. 357); and uniformly followed by the courts of Pennsylvania and cited by other state courts and text writers is authority for the proposition:

> *That contributory negligence cannot be imputed as matter of law to a person who, by reason of defendant's negligence, is confronted by the sudden emergency of getting on or off a moving train and is injured while making either attempt; and this because his bewilderment, anxiety or confusion of mind induced by emotions of affection, motives of personal advantage or business*

demands have "made him less cool and calculating" and more impulsive and instinctive than "those who are standing by."

The Johnson Case is not only the leading case in Pennsylvania, but is recognized as a leading American case in support of the rule that the *antecedent* negligence which places one in a position of emergency relieves the actor of the consequences of a mistaken or wrong choice, if he acted as an ordinarily reasonable person. This case on facts is identical with the instant case, excepting that in the Johnson Case, the admitted rate of speed *was three to four miles an hour* and the instant train had *"just started"* with motion so slow it could *not* be fixed and the plaintiff in the Johnson Case attempted to board notwithstanding the admonition of the trainmen. The facts of this case and the relevant and illuminating excerpts therefrom are set forth in Appellant's Brief, pages 24-26 and need not here be repeated, except to direct attention to the fact that in the Johnson Case, the train was in motion, running at about three miles an hour, when the plaintiff ran across the platform to board it and that Mr. Justice Agnew in his opinion on page 363 says:

> "But we think his *error was in laying down as a rule of law (italicized in opinion), a matter which was only an element in the evidence, to wit: that if the train was distinctly running on the track, so as to be perceptible to those alongside, the plaintiff was guilty of negligence in attempting to enter upon the train, and could not recover.*"

With particular reference to the emergency, Justice Agnew says:

> "*But clearly we are not to leave out of view, in all cases, the conduct of the railroad company in producing the result, and the natural and probable effect that conduct has had upon the mind of the passenger in in-*

fluencing his act. There cannot be an inexorable rule so unbending that no circumstances begotten by the railroad company itself, shall not change it. Even when a train is distinctly under way, there are cases, and this was one, where it must be left to the jury to say whether the danger of going aboard was so apparent that it would be culpable negligence in the passenger to attempt it."

Pennsylvania Cases Following the Johnson Case.

The Superior Court of Pennsylvania also adopted the emergency rule in Sieb v. Central Pennsylvania Traction Company ((1911) 47 Pa. Superior Ct. 228). This Appellate Court's attention should be directed to the significant fact that the principle of emergency as applied in the Johnson Case and in the Seib Case (supra) to an intending passenger attempting to board a train has in *four* other cases been applied by the courts of Pennsylvania to the emergency which relieves an actor who *attempted to leave a moving train.*

It is obvious that a passenger already on a train is in a *place of safety*; and consequently, he acts with full knowledge of the fact that the train is moving when he attempts to get off of it. The courts of Pennsylvania and elsewhere have been so solicitous to protect the passenger when he is forced in emergency to make a sudden decision, that they have uniformly held the questions of emergency and of contributory negligence *are for the jury when there are any facts from which the inferences of emergency fairly and properly could arise and the jury could find that the passenger acted as an ordinarily prudent person even though mistakenly.*

This Honorable Court is respectfully referred to pages 29-32 of Appellant's Brief where are reviewed with facts stated and excerpts given the Pennsylvania cases following:

Pennsylvania Railroad Company vs. Kilgore ((1858) 32 Pa. 292)
Pennsylvania Railroad Company vs. Thomas Lyons ((1889) 129 Pa. 113)
Pennsylvania Railroad Company vs. Jacob Peters ((1887) 116 Pa. 206)
Delaware and Hudson Canal Company vs. Webster ((1884) 18 Weekly Notes of Cases 339)

Federal Cases following the Johnson Case.

The law of emergency as affecting the mind of the decedent with instinctive and impulsive action and probable confusion and bewilderment is the same in the Federal courts as has been decided and applied uniformly in the courts of Pennsylvania. The facts and excerpts from the opinion of Circuit Judge Stone in the case of Redfield vs. New York Cent. R. Company ((1936) 83 Federal 2nd 62) are given on pages 32-34 of Appellant's Brief.

Every court which has considered the question has determined that *an intending passenger was confronted by an emergency when a defendant carrier started its train before he had time to board it.*

The Trial Court, without citing any authority, made the broad statement that (58a):

> "There was, however, no 'emergency' by any definition. *There was nothing unexpected about the starting of the train.* No doubt Mr. O'Daniel hoped that it would not start before he boarded it, but it can hardly be argued that he did not fully realize that it *might*."

It is obvious this conception of an emergency ignores entirely the duty of law which the carrier owed to the decedent as a passenger. The decedent as an intending passenger, of course, *might or might not* have realized the *possibility* that defendant might negligently start the train

without giving him an opportunity to board it. But as a reasonable and prudent man, he had a right to assume that having reached a point approximately twelve (12) feet from the train steps and standing alongside of the train at rest, and expecting to board a train not in motion, *no reasonable man would have anticipated that the train would be started without giving him an opportunity to board it. In split seconds, this decedent intending passenger was suddenly confronted with a moving instead of a standing train.*

An emergency is not necessarily a peril. It is a sudden condition which *comes forth* and calls for immediate action. It is in the choice that must be made that the hazard or peril lies; and it is the consequences of the choice that the law regards, because the action following the decision is impulsive or instinctive and not reflective.

The cases illustrative of the significance of emergency and its application to the law of negligence are reviewed in Appellant's Brief, pages 41-44 and the principle is also discussed in the Petition for Rehearing and Brief.

Applying the principles as to the nature and application of emergency to the case at bar, it is submitted that: 1. Decedent was faced with an emergency caused by being suddenly confronted with a moving instead of a standing train. 2. he had overpowering reasons why he wanted to get on the train—to get to his office, since his was the responsibility as District Sales Manager of a large metropolitan area, 3. his behavior would naturally become impulsive and instinctive, if not excited and confused, at the sight of the train starting suddenly. 4. A reasonable man under similar circumstances would have made the attempt to board and the suddenness of starting gave no time for deliberation. 5. He had no reason to anticipate that he would not board the train safely; 6. the law presumes Decedent exercised due care in making the attempt; and 7. the existence of the emergency, the duty and its effect in exercise of due care on his part are for the jury and not a court's consideration.

(d) and (e) *Proximate Cause, Emergency and Contributory Negligence.*

Starting Train Proximate Cause of Injury.

The learned Trial Court expressly ignored the legal consequences of the Defendant's prior negligence as the proximate cause of the Decedent's death. It, moreover, directed a verdict solely on its conceptual interpretation of the law of negligence *per se* as applied to the acts alone of the Decedent. *It thus arbitrarily concluded the Decedent's act alone as proximate cause,* in utter disregard of the basic principle peculiarly applicable to the facts of the instant case. This universal rule of law on the controlling question of proximate cause as between the act of the Respondent carrier in starting the train before Decedent could board it and his subsequent intermediate act in attempting to board it just as it started is stated in Thompson on Negligence, Volume 1, section 64:

> *"Where a cause which results in injury to a person is set in motion by another, that other would be liable to the person injured although the intervening act or omission of such person was the immediate cause of his receiving the injury, providing the circumstances surrounding him are such that his act or omission ought not to be imputed to him as a fault."*

Va. Rwy. Co. vs. Arnold and Sustaining Cases.

This principle was applied as decisive of the question of proximate cause under similar facts of attempting to board a moving train by Mr. Justice Sims in Virginia Ry. &c. Company vs. Arnold ((1917) 121 Va. 204). In that case both facts and issues were practically identical with the instant case. Mr. Justice Sims says at page 214:

> "Since the decision of the case of City of Newport News, &c. v. McCormick, 106 Va. 517, 56 S. E. 281, by this court, it has been the settled rule in this State that it is not negligence *per se* to *alight* from a slowly moving street car. The same legal rule applies to the *boarding* of a slowly moving street car. In both cases the act of a person injured by the attempt to alight from or board a moving car would be the *immediate* cause of the injury. * * * That is to say, the general doctrine of the law of negligence is, *that the act or omission of the person injured, if it occurs in the exercise of ordinary care on the part of the latter, cannot be regarded as the proximate cause of the injury.* Certainly this doctrine is applicable to the conduct of passengers boarding or alighting from slowly moving street railway cars under the rule in this State above mentioned. *Under it, where the car being in motion is due to the negligence of another and contact with it causes the injury, the question of fact is, whether the act of the person injured, in attempting to board a slowly moving car, was one of ordinary care. If so, such act cannot be considered as the proximate cause of the injury.*"

The rule and its application have received universal acceptance. Shearman and Redfield, Revised Edition, Volume I, Section 37, page 101, states the rule as follows:

> "If the force which causes the injury is put in operation or motion by what is the negligence of the defendant and that force or motion is still in progress or operation and has not lost its identity and continuity as such when the injury occurs, *then the negligence which puts the injurious force in operation is the proximate cause.*"

See also in this connection Restatement of Torts, Section 433(c).

Pennsylvania has applied this principle in many cases. The late case of Morrison, et ux. vs. Philadelphia Transportation Company ((1946) 353 Pa. 269) is especially referred to because the Supreme Court reversed the granting of a non-suit on the ground—the evidence failed to show negligence, and held that by correct application of the basic principle of "proximate cause," the facts developed at the trial *were sufficient to support the finding of defendant's liability for proximate negligence in moving the car while plaintiff was attempting to get off.*

Mr. Justice Jones, former United States Circuit Judge for the Third Circuit differentiates between the proximate negligence of the motorman and the immediate act of the passenger, as follows:

> "The negligence in this case did not depend upon the manner in which the car was started or stopped. * * * The fault here ascribable to the motor man was *his improper timing of the staring and stopping operation in its relation to the appropriate movement of a passenger who was in the act of descending to the platform in order to alight from the car which was already at a standstill for the exit of passengers."*

In holding that under these facts the negligence of the defendant carrier was the "proximate cause" of the injuries received by a passenger, Mr. Justice Jones said:

> "We entertain no doubt that the facts of this case, as the jury could have found them, were sufficient to support findings that the defendant's employee was negligent *and that his negligence was the proximate cause of Mrs. Morrison's injuries."*

This Honorable Court has very recently given its approval of the action of the Circuit Court of Appeals for the Fifth Circuit in Henwood vs. Wallace ((1947) 159 Federal Second 263, wherein a writ of certiorari was denied May 5, 1947). In that case, the Circuit Court of Appeals *refused to apply*

as an absolute—"the duty to stop, look and listen for trains before going upon the tracks," giving as its reason on page 265:

> *"The failure to stop does not absolutely preclude recovery unless it appears that the failure to stop was a proximate cause of the accident."*

Where, as in the instant case, the force which caused the injury to the Decedent was set in motion by the act of the Defendant carrier, that act is the proximate cause of the injury unless all the circumstances surrounding the injured are such that his conduct is not that of a reasonably prudent man.

Proximate Cause and Emergency.

One of the most important considerations to be taken into account in determining this question is whether or not the act of the injured was done in an emergency. In the *Johnson Case*, the legal consequences of the negligent act of the defendant carrier as affecting the conduct of the injured person were determined and apply with equal force and the same effect to the similar behavior of the Decedent in the instant case. Contributory negligence cannot be imputed as matter of law, nor may the act of a deceased or injured person be held *as matter of law the proximate cause of the accident, where, by reason of a common carrier's negligence, he is confronted with the sudden emergency of getting off or on a moving train.* His bewilderment, anxiety or confusion of mind, induced by emotions of affection, personal advantage or business demands, have made him less cool and calculating and more impulsive and instinctive.

The reason which precludes charging the instant Decedent as matter of law with contributory negligence or concluding as matter of law his act in attempting to board the train as the proximate cause of the injury was stated by

Mr. Justice Agnew in the Johnson Case at page 365 in the language following:

> "In discussing the conduct of the passenger merely, we are not to lay out of sight the wrong of the company, *in its influence upon his mind and act* (italicized in opinion). *He may have strong motives* to reach his destination—indeed, no man but must feel, and feel strongly, at being left by the wayside; he is conscious of his right to go aboard, and *naturally becomes excited* at the sight of the moving train, perhaps *is alarmed*, and in some degree *confused*. If the train be *running slowly*, and the danger is *not apparent* to him, what so natural as that he should hurry to reach the train and to get aboard?"

And again in the next paragraph, he says:

> "But if we lay down the inexorable rule for this and every other case, that whenever the train can be seen to be *distinctly* running, it is legal negligence to attempt to get on, we set a premium *on the wrong of the company, which influenced the very act itself.*"

The learned Justice closes his opinion in the words particularly applicable and controlling in the instant case:

> *"No matter how slow the motion of the train was, nor how little danger in getting on was apparent to you, or what the state of your mind caused by our wrongful act,* it is *not* a question for a jury under the circumstances, but the law holds you *guilty* of *culpable negligence* in the attempt to board the train, and we are allowed to go free. *This is too stringent a rule for the case.* Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing of something which such a man would not do, *under all* the circumstances surrounding the particular case: Shearman & Redfield on Negli-

gence, Section 71; Kay v. Penna. Railroad Co., 15 P. F. Smith 273. Instead, therefore, of the rule laid down by the learned judge, he should have *left it to the jury to say, under all the circumstances* in evidence, whether the danger of boarding the train, when in motion, *was so apparent* as to have made it the duty of the plaintiff to desist from the attempt."

In Pennsylvania R. Company vs. Jacob Peters ((1887) 116 Pa. 206), the Supreme Court shows the utter impossibility of any attempt by a trial judge to determine as a matter of law the question of whether or not the instant decedent was confronted with an emergency, since Mr. Justice Sterrett states at page 216:

> "Negligence is the absence of care according to the circumstances, and is always a question for the jury when there is a reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and *reasonable care*, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury. * * * It is impossible to formulate a fixed rule of duty applicable to all cases. *The opportunity for deliberation and action, the degree of danger, and many other considerations of like nature, affect the standard of care that may be reasonably required in a particular case.*"

The Trial Judge's error in concluding as a matter of law that there was no emergency (58a) becomes more apparent because of his prior erroneous conclusion as to the speed of the train, thus eliminating one of the most important facts to be considered in the determination of the fact of emergency. *The Circuit Court bases its conclusion of no emergency alone on the statement—"There was nothing unexpected about the starting of the train";* thus ignoring every other circumstance, and particularly, the undisputed

fact in evidence that the Decedent arrived at the edge of the station next to the train while it was then at rest. This erroneous conclusion likewise ignores the fundamental distinction in the law of negligence as applied to due care in that Decedent in attempting to board the train was in the exercise—*not of a mere privilege or license*—but of an undoubtful legal right *as a passenger having* given to those in charge of the train clear and unmistakeable evidence of his intention to board it while it still was at rest. Under these circumstances, it is submitted that Decedent was under no duty to anticipate that the train would be started before he had an opportunity safely to board it.

(f) *Factual Issues.*

Subsequent sections (3) and (4) of this Argument discusses more fully and at large the factual issues of Respondent's negligence, emergency, proximate cause and contributory negligence.

(2)

CIRCUIT COURT OF APPEALS FAILED TO APPLY THE LOCAL LAW IN ACCORDANCE WITH THE DOCTRINE OF ERIE RAILROAD COMPANY VS. TOMPKINS (SUPRA).

Johnson Case Not Followed.

This Honorable Court, within a few weeks after rendering its decision in Erie Railroad Company vs. Tompkins (supra), laid down the rule which the lower Federal courts must follow in the determination and application of state law. In Ruhlin vs. New York Life Insurance Company ((1938) 304 U. S. 202, 82 L. Ed. 1291), Mr. Justice Reed at page 209 says:

> "The parties and the federal courts must now *search for and apply the entire body of substantive law governing an identical action* in the state courts."

Both the District Court and the Circuit Court of Appeals explicitly refused to follow and apply the local law as announced and applied by the Pennsylvania Supreme Court in Johnson vs. The West Chester and Philadelphia Railroad Company (supra), a case which involved similar essential facts and identical issues of law with those in the instant case. The sole reason given for its refusal, as stated in the opinion of the District Court (57a), follows:

> "Johnson v. The West Chester and Philadelphia Railroad Co., 70 Pa. 357, goes further than any of the others and I am inclined to think it may be out of line with subsequent decisions. If so, it might be taken to have been overruled or narrowly limited by them. * * * It is plain from the opinion that the *practical basis* of the decision was that the close connection and the failure of the second train to wait amounted almost to the railroad's setting a trap for its passengers."

The guess of the Trial Court that the Johnson Case might have been decided differently by the present, and the prophesy that is will be overruled by a later, Supreme Court of Pennsylvania should merit little consideration by this Court, and this not only because *this case has never been overruled, modified, criticized or questioned. It uniformly has been followed in Pennsylvania, referred to with favor by text writers and has been approved by the Appellate Courts of other states and, particularly, in the very late Missouri case of Gunn vs. United Railways Company of St. Louis* (Mo. 1917), 193 S. W. 814, L. R. A. 1917 D. 1131).

It should be here suggested that the "practical basis" of the decision was not because a trap had been set by the railroad for its passengers, but, on the contrary, the true basis of the decisions so far as the application of Erie Rail-

road Company vs. Tompkins (supra) is concerned, *was the Court's refusal to declare the rule that it is negligence per se for an intending passenger to get on a moving train,* as the following quotation from the opinion irrefutably shows:

> "But if we lay down the inexorable rule for this and every other case, that whenever the train can be seen to be distinctly running, it is legal negligence *to attempt to get on, we set a premium on the wrong of the company, which influenced the very act itself.*"

In Six Companies of California vs. Joint Highway District No. 13 of the State of California ((1940), 311 U. S. 179, 85 L. Ed. 115), in reversing the Circuit Court of Appeals for the *Ninth* Circuit for the refusal to apply the state law as announced by the state court in an action involving identical issue, Mr. Chief Justice Hughes said on page 188:

> *"The Circuit Court of Appeals should have followed the decision of the state court in Sinnott v. Schumacher with respect to the inapplicability of the liquidated damage clause in the event of the abandonment of work under the contract, and its judgment to the contrary is reversed."*

This Court granted certiorari and reversed the Circuit Court of Appeals for the Second Circuit in Conway vs. O'Brien ((1941), 312 U. S. 492; 85 L. Ed. 969) alone for failure to apply a line of decisions disclosed by a search from the entire substantive body of state law. In this case, as in the instant case, the jurisdiction of the Court was based on diversity of citizenship and *application of the appropriate rule of local law involved the question of speed of a moving vehicle, being either a question of law or of fact for the jury.* Under the substantive law of Vermont, there was one line of decision which made it necessary that the case be submitted to a jury, while under another line of decisions, the court could refuse to submit the question. This court,

in reversing the Circuit Court in its opinion by Mr. Justice Reed held at page 496:

> "Admittedly there are instances among the Vermont cases which might be logically cited to support a refusal to submit this case. About as many are on the other side. We think the District Court correctly appraised the law and facts."

Presumption of Decedent's Due Care.

The Trial Court also refused to consider and follow the substantive Pennsylvania law as to the presumption of due care in tort actions involving death. Erie vs. Tompkins (supra) makes application of this presumption mandatory in the instant case, since such presumption, when there are other facts tending to show the absence of Decedent's contributory negligence, must be submitted to the jury as evidentiary of due care. As is demonstrated in the cases cited in the succeeding paragraphs and in Appellant's Brief on pages 48-50 and in Appellant's Reply Brief on page 10.

(3)

RULE 50 OF THE RULES OF CIVIL PROCEDURE HAS NOT TAKEN AWAY FROM JURIES AND GIVEN TO JUDGES ANY PART OF THE EXCLUSIVE POWER TO (a) FIND FACTS, (b) WEIGH EVIDENCE AND (c) DRAW INFERENCES.

Relevant U. S. Supreme Court Cases.

This Court long prior to the promulgation of Rule 50, in the leading case of Richmond and Danville Railroad Company vs. Powers ((1892), 149 U. S. 43) considered the respective powers of judge and jury in actions involving a

breach of duty by a common carrier resulting in injury to a passenger and laid down the rule at page 45 that:

> *"It is well settled where there is uncertainty as to the existence of either negligence or contributory negligence that question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony or because the facts ~~by~~ being undisputed fair minded men will draw different conclusions from them."*

Since promulgation of Civil Rule 50, in Berry vs. United States of America ((1941), 312 U. S. 449; 85 L. Ed. 945), it was pointed out that Rule 50 has in no way modified the exclusive constitutional function of a jury to weigh evidence and to draw inferences therefrom. Mr. Justice Black, speaking for the Court, says at page 453 that the rule "has not taken away from juries and given to the judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal for trying facts in courts of law."

The Circuit Court of Appeals for the Second Circuit was reversed in that case solely because this Court determined there was evidence from which a jury could infer "total and permanent disability"—the factual issue involved.

This Court has granted certiorari and reversed wherever it appeared that any infringement had been permitted of the jury's exclusive constitutional right to consider the facts and to draw the inferences, as an outline analysis of the following cases will disclose:

In Lavender vs. Kuhn ((1946), Law Ed. Advance Opinions Vol. 90, No. 11, page 692), certiorari was granted to review the propriety of the Supreme Court of Missouri's action in directing a verdict in an action involving the negligence of a defendant carrier resulting in the death of the injured party. The state Supreme Court held that "all reasonable men would agree that it would be mere specula-

tion and conjecture to say that decedent was struck by the mail hook."

This Court in reversal, in an opinion by Mr. Justice Black, said at page 696:

> *"It is no answer to say that the jury's verdict involved speculation and conjecture";*

and then again emphasized:

> "Whenever facts are in dispute or the *evidence is such that fair minded men may draw differences inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inferences.* Only where there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion, *and the appellate function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*"

This Court granted certiorari and reversed the Circuit Court of Appeals for the First Circuit in the case of Helene A. Jesionowski, Administratrix vs. Boston and Maine Railroad, reported in Law Edition (1947), Advanced Reports, Vol. 91, No. 5, at page 355, because of the limitation of the Circuit Court of Appeals of the exclusive province of a jury to draw inferences. The Circuit Court, as did both the lower courts in the instant case, construed and *applied the applicable rule of law as an absolute*, thereby restricting the right of a jury to decide questions of fact and to draw inferences from all of the facts and circumstances. The Circuit Court of Appeals in that case applied the rule of *res ipsa loquitur* to bar the jury from drawing an inference of

defendant's negligence for an accident growing out of a general set of circumstances, including the actions of the injured person, even though a jury under proper instructions could find from the evidence that the injured party's actions did not cause the injury.

In disavowal of the Circuit Court's conceptualistic interpretation and application of the *res ipsa loquitur* rule, Mr. Justice Black said at page 358:

> "*Res ipsa loquitur* thus applied would bar juries from drawing an inference of negligence on account of unusual accidents where the injured person himself participated in the operation; even though it was proved that his operation of the things under his control did not cause the accident. This viewpoint unduly restricts the power of juries to decide questions of fact and, in this case, the jury's right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are Federal questions. *A conceptualistic interpretation of res ipsa loquitur has never been used by this Court to reduce the jury's power to draw inferences from facts.*"

Again, in Myers vs. Reading Company, reported in Law Edition (1947), Advanced Reports, Vol. 91, No. 15, page 1199, this Court granted certiorari and reversed the Circuit Court of Appeals for the Third Circuit where, as by it stated:

> "The only question before us is whether there is sufficient probative evidence with the inferences that the jury could draw from it, to support the verdict for the petitioner."

Mr. Justice Burton, after pointing out that the questions at issue were questions of fact and that the jury was entitled to draw the inferences therefrom, tersely states on page 1203:

> "In face of this, the trial court erred in entering a judgment for the respondent in accordance with the motion for a directed verdict."

And on the same page, he says:

> "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear, but where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to disregard or to disbelieve whatever facts are inconsistent with its conclusion."

It is respectfully submitted that the Trial Judge, in directing the verdict in the instant case under Rule 50, disregarded the rules which this Court has so clearly announced and repeated in the above cases as to invade the exclusive province of the jury.

(4)

THE CIRCUIT COURT OF APPEALS,—IN SUSTAINING THE DISTRICT COURT'S LAW CONCLUSION OF DECEDENT'S CONTRIBUTORY NEGLIGENCE IN THIS CASE OF DOUBTFUL FACTS AND DIFFERENT INFERENCES BY (a) DRAWING INFERENCES FROM INFERENCES BASED ON ASSUMPTIONS NOT IN EVIDENCE, (b) IGNORING MATERIAL FACTS IN EVIDENCE AND (c) DRAWING THE MOST UNFAVORABLE INFERENCE FROM OTHER FACTS—HAS SANCTIONED THAT COURT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE IN SUCH MANNER AS TO CALL FOR THIS HONORABLE COURT'S POWER OF SUPERVISION.

Essential Facts Ignored.

A summary of the undisputed facts following which the Trial Court ignored should suffice to demonstrate his departure from the usual course of procedure as to call for correction by this Honorable Court:

(a) The train had not moved more than twelve (12) feet at the time the Decedent attempted to board it. (See Appellant's Brief, pages 18, 42, 45, Appellant's Reply Brief, pages 6-8.)

(b) All witnesses agreed that the motion of the train at that time was so slow that they could not estimate its speed, as it was just starting. (See Appellant's Brief, pages 18, 20, 21, 24a.)

(c) The Decedent was a strong and agile man. (See Appellant's Brief, pages 28, 29, 33, 34a.)

(d) Miss McAllister's testimony that Decedent took one or two steps in the direction of the train (see Ap-

pellant's Brief, pages 24a, 25a, 26a) and Miss Vaux's testimony that he moved towards it (15a) in his attempt to board it. (See Appellant's Brief, pages 12, 13, Petition for Rehearing, page 4.)

(e) The position in which the body was found at right angles to the rails and severed at the waist. (See Appellant's Brief, pages 13, 48, 49, Petition for Rehearing, pages 4, 5, and

(f) At or a few feet beyond the point where he grabbed the stanchion. (See Appellant's Brief, pages 11-13, 18-20; Reply Brief, pages 1, 6-8, Petition for Rehearing and Brief, pages 2-5.)

Unfavorable Inferences Drawn.

The Trial Judge not only ignored the essential and pivotal facts as above summarized, but drew the most unfavorable inference as to the rate of speed of the train from another inference which was based on the assumption of facts not warranted by the evidence.

The Trial Judge stated the reasons for such action as follows (58a):

> "In the present case, however, the train, when Mr. O'Daniel attempted to board it, could not have been going *less than three or four miles an hour because, as he stepped along with it, holding the grabiron, his pace was described as 'probably a little hasty.'* "

This most unfavorable inference of speed was made in utter disregard that (a) there is not a word in evidence as to the speed of three (3) or four (4) miles per hour or of any speed, (b) the speed of the train was so negligible that the witness in a position best to judge it could not fix its speed and (c) that at most, it had not moved more than twelve (12) feet.

The testimony of the witness, Miss Vaux, is (21a, 22a):

Q. *Would you be able to say how fast the train was moving at the time the steps reached him?*

A. *No,* it had only moved part of the length of one car.

Q. You would not be able to say how fast the train was moving at that time?

A. *It had just started.*

This unfavorable inference was based alone on an inference drawn from an assumption of facts not warranted by the evidence. The Trial Judge drew the inference of Decedent's *"pace"* of *"three or four miles per hour"* from facts not warranted from the evidence, since he relied solely on the testimony of Miss McAllister, which follows (24a, 25a and 26a):

BY MR. WRIGHT:

"Q. What do you mean by 'steps,' Miss McAllister.

A. Well, as the train started and he had hold of the handle, I would say *he moved a couple of steps with the train to get on the train, on the steps of the train."*

BY THE COURT:

"Q. That is, he moved *one or two steps* after he took hold of the grabiron, is that right?

A. That is right.

Q. He did not walk along before he ——

A. *No, he was standing there waiting."*

BY MR. PRICE:

"Q. Do you mean he stepped or ran along with the train a couple of steps before he tried to get aboard?

A. Well, he stepped a couple of steps *to get aboard the train."*

Q. In other words, he got hold of the handle with his right hand?

A. Yes, sir.

Q. Then he went *in the direction of the train a couple of steps* before he fell?

A. Yes, sir.

Q. Can you tell whether he was walking or running on the station platform at that time, the way he appeared to you?

A. Well, *I couldn't say he was running then, no, he wasn't,* probably a little hasty.

The record does not disclose that any witness testified to any pace, either walking or running. The testimony of the witness relied on, as shown by the above quoted excerpt, expressly denies that Decedent was running and she explicitly states that he did not "walk along," but "moved one or two steps after he took hold of the grabiron" "in the direction of the train" in order to "get aboard the train."

Every witness testified that he was standing alongside of the train when he attempted to board and moved in the direction of the train. It should again be stated that this Court is not requested to draw the proper or any inference, but it is suggested that a jury could draw more than one inference from the evidence, both as to rate of speed of the train and the manner in which the Decedent made his attempt to board it; e. g., the reasonable inferences following:

Different and Favorable Inferences.

(a) The train was just starting, with speed so negligible that no witness could fix it.

(b) The Decedent moved in the direction of the train in an effort to board it from a standing position alongside of it.

(c) Decedent's first step of his two steps towards the train, after he grasped the stanchion, was to put one foot on the car step and the second step placed his other foot on the second step of the car, or that his first step was on the station platform and his second step placed his foot on the step of the car.

(d) The position in which the body lay on the rails corroborates the testimony that Decedent was not running along with the train; for as his foot on either step slipped and his hold on the stanchion gradually relaxed, his steps could have been taken only *from* a step or two from the *edge* of the platform *towards* the train to board it.

(e) And this because (1) he could not have stood on the *extreme edge* of the platform as it started and (2) the movement of the train was so slow that the *momentum* imparted to the body was without effect on its direction as the body slid at right angles to the rails, and (3) with so little *force* that the feet did not reach the North rail and the body was severed at the waist by the wheels running on the South rail.

It is then clear that the learned Trial Judge, *ignoring every fact and inference explanatory of the death,* drew only one inference; and that the most unfavorable to the Petitioner and based on an assumption, and not a fact in the proofs. (See Appellant's Brief, pages 45-48; Appellant's Reply Brief, pages 5-8, Petition for Rehearing and Brief, pages 2-5.)

Relevant Cases Reviewed.

This Honorable Court has always corrected so obvious an error in all similar situations as reference to the cases following will confirm.

In Conway vs. O'Brien (supra), Mr. Justice Reed said at page 493:

> "*If the facts most favorable to the petitioner were accepted,* the jury might have concluded properly that the defendant's car approached from the south a covered bridge on a little used country road at a speed of fifteen miles per hour.* * *"

The decision then concludes on page 494:

> "Under these circumstances we are of the opinion that the Vermont law required the submission of the question of gross negligence to the jury."

In Halliday vs. United States of America ((1942), 315 U. S. 94; 86 L. Ed. 711), this Court again exercised its power of supervision in correcting the action of the Circuit Court of Appeals for the Fourth Circuit in relying on an unfavorable inference by it drawn. Mr. Justice Byrnes stated at page 99:

> "And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. *However, this was but one of the many factors which the jury was free to consider in reaching its verdict.*"

The action of the Trial Court in ignoring pivotal and undisputed facts, drawing inferences from assumed facts not of record and the most unfavorable inference by ignoring facts from which other and more favorable inferences could be drawn is submitted as such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Mr. Justice Sutherland in Dimick vs. Schiedt ((1934), 293 U. S. 474), said at page 486:

> "*Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.*"

In Kreigh vs. Westinghouse C. & K. Company ((1908), 214 U. S. 249), it is said by Mr. Justice Day:

> "*Questions of negligence do not become questions of law to be decided by the court except 'where the facts are such that all reasonable men must draw the same*

*conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. * * *'"*

In Erie Railroad Company vs. Tompkins (supra), while reversing the Circuit Court of Appeals for failure to follow the substantive law of the Commonwealth of Pennsylvania, this Court significantly did not question the submission of the case for a jury's determination where the Circuit Court of Appeals, after citing this Court's decision in Richmond and Danville Railroad Company (supra), said:

"To us it would seem imprudent to walk or even to stand in the dark within a foot of a train moving at the rate of ten miles an hour; but the fact that recoveries have been allowed under closely similar circumstances in the cases above cited indicate that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury."

Presumption of Decedent's Due Care and Province of Jury.

In this case the passenger was instantly killed at the very point or only a few feet from where he attempted to board the train as it was just starting. The decedent was standing one or two steps from the edge of the station platform about 12 feet from the rear steps of the third car from the end of the train when it started moving in his direction. As the stanchion of the platform of that car reached him he grabbed the stanchion, took "maybe one or two" steps towards the train to board it. The train moved a few feet after he attempted to board it when he gradually slid between the bumpers of the cars to the rails. The speed of the train was so negligible that not only the witnesses could not estimate it, but no mechanical device is in common use sufficiently

sensitive accurately to have registered it. Decedent's body was severed at the waistline and was lying at right angles to the rails; the feet and lower limbs pointed toward, but did not touch, the north rail; the trunk and head toward the north side of the station platform. These facts conclusively show decedent was not propelled by any momentum of his body nor by any movement of the train; but must have slid slowly from an almost standing train between the bumpers, and the wheels must have passed over him the instant his body came in contact with the south rail. *A running attempt to board a fast moving train is here thus negatived, for otherwise the body would have been mangled or thrown aside by the momentum which the train imparted to the body.*

It is in this situation, and the irrefutable facts of the negligible movement of the train and the standing passenger, that the presumption of decedent's due care arises in this case in addition to the mere fact of death. IT IS THIS PRESUMPTION, WITH ALL OTHER FACTS PERSUASIVE OF DUE CARE UNDER THE CIRCUMSTANCES, WHICH PREVENTS THE COURT FROM DECLARING AS MATTER OF LAW THAT SUCH PRESUMPTION HAS BEEN OVERCOME.

The late Pennsylvania cases are referred to in pages 48, 49 and 50 of Appellant's Brief of Argument, and the last cases on page 10 of the Reply Brief of the Appellant. Reference in this connection for the convenience of the court is here made to Atkinson vs. Coskey (1946), 354 Pa. 297, because particularly applicable to the facts of the instant case since it is the latest expression of the Supreme Court of Pennsylvania on negligence for failure of a person, under a duty to look, to see another who is in plain view and must have seen him if he had performed his duty.

On the first aspect of the contributory negligence of deceased, Mr. Justice Jones, former Circuit Judge for the Third Circuit, says on page 307:

> *"There was no conclusively established fact in the plaintiff's case on the basis whereof the trial court could say as a matter of law that the decedent was guilty of contributory negligence * * *. Contributory negligence may be declared as a matter of law only in clear cases:* And, that is no less true with respect to the conduct of a deceased victim of an accident who, in the first instance, is presumed to have exercised due care for his own safety."

In Scholl vs. Philadelphia Suburban Transportation Company (1947), 356 Pa. 217, in applying the presumption of due care against a directed verdict on the ground of contributory negligence, Mr. Justice Jones on page 224 said:

> *"To take away summarily, on the ground of contributory negligence, a plaintiff's right to go to the jury on that question, upon the presumption of his decedent's care, requires evidence so clear, direct and positive as to preclude any difference in the minds of fair and reasonable men with regard to the decedent's negligence."*

SUMMARY.

In conclusion, it is submitted this Petition may be refused, if this Honorable Court concludes it is negligence *per se* under Pennsylvania law for a passenger to attempt to board a train moving however slowly. But its prayer should be granted, if this Court is of opinion that the learned Trial Court did not consider the entire body of substantive Pennsylvania law and refused to apply that law as announced in Johnson vs. The West Chester and Philadelphia Railroad Company (supra), which stated the correct rule applicable to the instant case:

(1) Respondent was negligent in starting the train before Decedent passenger could board it;

(2) Such negligence confronted Decedent with an emergency which imposed on him the duty of due care, but relieved him of the consequences of a wrong choice; and that

(3) Because the facts are doubtful and in conflict and reasonable men might differ as to the inferences, a jury must determine the facts of (a) emergency, (b) Respondent's proximate negligence in relation to Decedent's immediate act and (c) Decedent's contributory negligence, in connection with the presumption of his due care.

It is respectfully submitted that the learned Trial Court erred in its application as a conclusion of law of an assumed absolute rule of the law of negligence contrary to the law of Pennsylvania; and that this record affirmatively and conclusively discloses doubtful and conflicting facts and different inferences alone for a jury's determination.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOHN W. DICKERSON,
RUBY R. VALE,
Attorneys for Petitioner.

FILE COPY

In the

Supreme Court of the United States

October Term, 1952.

No. 382.

JESSIE L. O'DANIEL (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

No. 383.

JESSIE L. O'DANIEL, Executrix of the Will of WILLIAM BRYAN O'DANIEL, Deceased (Plaintiff-Appellant in the Court Below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (Defendant-Appellee in the Court Below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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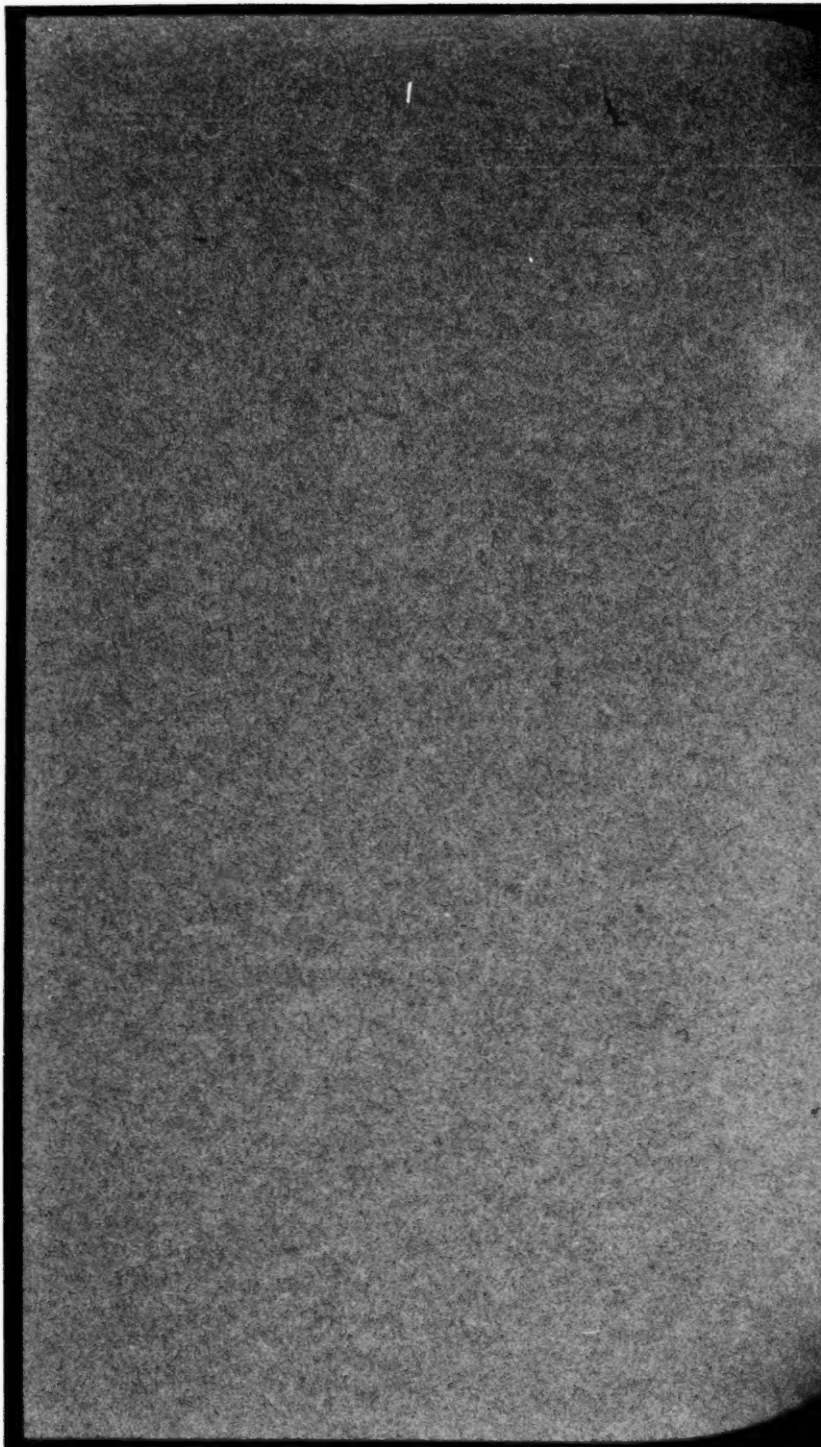

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 382.

JESSIE L. O'DANIEL (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

No. 383.

JESSIE L. O'DANIEL, EXECUTRIX OF THE WILL OF WILLIAM BRYAN O'DANIEL, DECEASED (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 62a) is reported in 162 F. (2d) 414. The opinion of the District Court (R. 55a) is reported in 72 F. Supp. 15.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented.

Whether the United States District Court for the Eastern District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit correctly held that under the law of Pennsylvania the attempt of the plaintiff's decedent to board a moving train constitutes negligence as a matter of law so as to bar recovery for his death resulting therefrom.

Statement.

Petitioner, a resident of Tennessee, brought two actions in the United States District Court for the Eastern District of Pennsylvania to recover for the death of her husband, William O'Daniel, who was killed in an unsuccessful attempt to board an electric suburban train operated by the Respondent on September 28, 1943, after it had started to move out of Respondent's station at Ardmore, Pennsylvania. The jurisdiction of the District Court was based solely upon diversity of citizenship. The actions were tried together.

O'Daniel, a regular commuter, was late for the train on the morning in question. The train reached the station before him, and in an effort to catch it he ran diagonally across the automobile driveway from the bank building corner to the station platform, a distance of some 90 feet (R. 11a). Before he reached the station, all the passengers on the platform had boarded the train and the signal to start the train was given just as he reached the south edge of the station platform, which at that point was 20 feet wide (R. 7a). The starting signal was heard by a Miss Vaux, who had alighted from the train when it arrived at Ardmore station, walked around the end of the station building and was about 30 feet out in the driveway (R. 14a) when she stopped and turned around to see whether O'Daniel would make it (R. 13a). Presumably the starting signal was also heard by O'Daniel because, instead of turning after he had passed the end of the station building and running toward the steps of the car which were nearest

to him, he proceeded directly across the platform (R. 20a, 21a), arriving at the north side of the platform adjacent to the train just as the train started (R. 14a). He then stood still alongside the main body of one of the cars (R. 14a-15a) and waited for the movement of the train to bring the steps of the car to him (R. 15a, 17a, 21a). When they came opposite to him he grasped the iron hand hold on the side of the car (R. 15a), took a couple of hasty steps "to build up momentum in order to help him board the train" (R. 26a) and "all of a sudden" (R. 15a) fell under the train and was killed.

The only witnesses who testified about the accident were two women called by the plaintiff, one of whom testified that she was unable to say how fast the train was moving at the time the steps reached O'Daniel (R. 20a), and the other of whom said that the train "was moving slowly" (R. 24a) when she saw O'Daniel on the platform, but was not asked and did not testify how fast it was moving when O'Daniel attempted to board it. However, there was no doubt that the train was moving, and at an accelerating speed, since it was leaving the station, and plaintiff's two witnesses not only did not testify, but did not even suggest, that the train was moving at a speed "so negligible" that they could not fix its speed, as is repeatedly but quite inaccurately (see R. 20a, 21a, 24a) asserted in petitioner's brief, as on pages 13, 19, 37, 38 and 43.

There was no evidence that O'Daniel, in his diagonal run across the driveway to the southeast corner of the station building, was visible to any member of the train crew, nor was there any evidence that any of the crew was in a position to see him when the signal to start the train was given by sounding the starting whistle, which is done either from the platform or from the inside of the car. When the starting whistle sounded O'Daniel had just reached the south edge of the station platform (R. 14a). The station building, from behind which O'Daniel suddenly

emerged on the south edge of the station platform just as the starting whistle sounded, was 48 feet long (R. 9a) and effectively screened him from anyone standing beside the train on the north side of the platform. Nor was there any evidence that any of the crew was hanging out beyond the side of the train so as to be able to see him when he crossed the platform and stood close to the train, waiting for the steps of the car next to which he was standing to reach him (R. 15a), or that if they had seen him stop running and stand alongside the train on the platform, they would have been bound to know he would not concede that he had missed the train, and wait a few minutes for the next one, but would assume the risk of trying to clamber aboard the moving train.

Petitioner likewise failed to show accurately how far the train moved before O'Daniel tried to board it and how far his "couple of steps" (R. 25a, 26a, 27a) took him alongside the train before he fell. Under the petitioner's evidence the first distance could not have been less than 12 feet but was probably more (R. 45a, 46a, 58a) and the second distance was not even estimated.

Although the trial judge had "very grave doubts as to there being any evidence . . . of negligence on the part of the defendant" (R. 49a), he did not rule on that part of respondent's motion under Rule 50, which was presented at the close of plaintiff's case, but directed verdicts for the defendant because the deceased was guilty of contributory negligence in attempting to board a moving train (R. 48a, 49a) which, under the law of Pennsylvania, barred any recovery for his death. Similarly, in the opinion subsequently filed the District Court assumed *pro arguendo* that defendant was negligent, but expressly did not pass upon that question because it was unnecessary to do so (R. 60a). The Circuit Court affirmed the judgments entered by the District Court and adopted that court's opinion as its own (R. 62a).

ARGUMENT.

I. The Petition Does Not Raise Any Question of Gravity or General Importance That Deserves Consideration By This Court.

No federal question is raised by the petition. The right of the petitioner to recover for the death of the decedent is governed by Pennsylvania law. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1938). The only issue raised herein is whether under Pennsylvania law the petitioner is barred from recovery because her decedent was guilty of contributory negligence as a matter of law in attempting to board a moving train, since contributory negligence is an absolute bar to recovery in Pennsylvania. *Kasanovich, Admrx., v. George et al.,* 348 Pa. 199, 201-2, 34 A. (2d) 523 (1943). The petitioner's argument that she has been deprived of her right to a jury trial improperly assumes that under Pennsylvania law there is some issue of fact which should have been submitted to the jury.

In the courts below the Pennsylvania law was construed and applied by a Pennsylvania Federal District Judge of long experience and by three circuit judges whose circuit includes Pennsylvania, two of whom had long experience at the Pennsylvania bar. There is no merit in petitioner's contention that the decision below is in conflict with decisions of the Supreme Court of Pennsylvania. See pp. 6-9, *infra.* In these circumstances it is submitted that the decision of the courts below should not be disturbed and that review by this Court is unnecessary. Compare *MacGregor, Executor, v. State Mutual Life Assurance Co.,* 315 U. S. 280, 281 (1942).

II. The Courts Below Correctly Construed and Applied Pennsylvania Law.

A. *The Supreme Court of Pennsylvania has clearly laid down the rule that to attempt to board a moving train is negligence* per se *and bars recovery for any consequent injury.*

In eight cases decided in the first ten years following the turn of the century, the Supreme Court of Pennsylvania reiterated again and again, as clearly as the English language would permit, the rule that to get on or off a moving train is negligence *per se*. In these decisions the Supreme Court of Pennsylvania specifically limited to their own peculiar factual situations the two or three earlier decisions, including *Johnson v. The West Chester and Philadelphia Railroad Company*, 70 Pa. 357 (1872), upon which petitioner relies.

McCracken v. Consolidated Traction Company (No. 1), 201 Pa. 378, 50 Atl. 830 (1902), involved facts that are not similar to those of the instant cases, but the court's dictum (201 Pa. at page 383) made clear what it assumed had always been the law:

> "It is per se negligence to get on or off a moving car; yet we see usually prudent and careful men, every day commit that act and comparatively few are injured; *but, nevertheless, it is negligence:* . . ." (Emphasis supplied.)

In *Powelson v. United Traction Company*, 204 Pa. 474, 54 Atl. 282 (1903), the court held that it was for the jury to determine under the evidence in that case whether or not the plaintiff, who had negligently boarded a moving car, had reached a place of safety before he fell, and thus whether his injuries were attributable to his boarding a moving car or to the traction company's subsequent negligence in accelerating with a jerk. But the court said (204 Pa. 474, 476):

> "To step on or off a moving car, whether the power which propels the car be steam or electricity, is per se, negligence, and if injury results to the passenger he cannot recover damages . . ."

Only a few months later, in *Hunterson v. Union Traction Company,* 205 Pa. 568, 55 Atl. 543 (1903), the court affirmed a judgment of nonsuit against a plaintiff who had boarded a street car while it was slowing down but while it was still moving at three or four miles an hour. Even Mr. Justice Mestrezat, who filed a lengthy dissent from the holding of the majority, declared (205 Pa. 568, 579):

> "Where one attempts to board a moving car and is injured by his own carelessness he cannot recover, and it is immaterial at what rate of speed the car is running."

The next case, *Boulfrois v. United Traction Company,* 210 Pa. 263, 59 Atl. 1007 (1904), is the last in the Supreme Court of Pennsylvania in which the *Johnson* case is even mentioned on this point, and it is referred to as a "rare exception" to the well established rule that it is negligence *per se* to attempt to get on or off a moving train. In the very first sentence of the opinion the court said:

> "We desire it to be distinctly understood that in Powelson v. United Traction Co., 204 Pa. 474; Hunterson, v. Traction Co., 205 Pa. 568 and Bainbridge v. Traction Co., 206 Pa. 71, we had no intention of relaxing the well-established rule, 'That to get on or off a moving car, whether propelled by steam or electricity, is negligence per se in him who attempts it.'"

and later (210 Pa. 263, 266):

> "We have tried to make our meaning plain; if we have failed it is either because our obtuseness of perception or poverty of language fails to make plain to others what is plain to us."

Tobin v. Pennsylvania Railroad, 211 Pa. 457, 60 Atl. 999 (1905), was decided the following year. The court affirmed per curiam a judgment of nonsuit entered against a passenger who boarded a train which had just started to move as he arrived at the top of the steps which led to the station platform. The court said (211 Pa. 457, 458):

> "No conclusion could have been reached from the plaintiff's testimony that would have relieved him from the imputation of negligence. There was nothing in the circumstances to make the case an exception to the rule that it is negligence per se to step on a moving train."

In *Purvis v. Buffalo R. & P. R. R. Co.,* 219 Pa. 195, 68 Atl. 189 (1907), the court also affirmed a judgment of nonsuit on the ground that the plaintiff was contributorily negligent as a matter of law for attempting to get off a moving train, and stated by way of explanation (219 Pa. 195, 201):

> ". . . The rule is founded on solid considerations of public policy for the safety of the traveling community, the exceptions are few in number and the cases must come very clearly within them."

The last two cases decided by the Supreme Court of Pennsylvania during this period, which also restate positively the rule of law that it is negligence *per se* to attempt to board a moving car, are *Quinn v. Philadelphia Rapid Transit Company,* 224 Pa. 162, 73 Atl. 319 (1909), and *Bradney v. Philadelphia Rapid Transit Company,* 232 Pa. 127, 81 Atl. 187 (1911), and since that time the doctrine of those cases has been considered so firmly established that it has never been challenged in the courts of this state.

Hower v. United Traction Company, 231 Pa. 626, 80 Atl. 1129 (1911), and *Hawkins v. Director General of Railroads,* 277 Pa. 213, 121 Atl. 46 (1923), are direct authority for the equally well established Pennsylvania rule that it

is contributory negligence as a matter of law to alight from a moving car, and this is so even if the passenger alights at the invitation of the conductor of the train, *Purvis v. Buffalo R. & P. R. R. Co.*, 219 Pa. 195, 68 Atl. 189 (1907), supra, whatever may have been said on the subject in 1884, or at some other early date.

The law of Pennsylvania is made abundantly clear by these decisions and the Court below was bound to follow them and not let a jury speculate whether the passenger was justified in believing that he could board, without injury, a train that was already leaving the station. As was said in the *Purvis* case, supra, 219 Pa. at p. 201, "the rule [that one may not recover damages suffered in boarding a moving train] is founded on solid considerations of public policy for the safety of the traveling community" and the fact that it has not been modified in any later case is conclusive evidence of how deeply rooted it is in the law of Pennsylvania. The present attempt to circumvent it by bringing suit in the Federal rather than in a state court and basing an argument on theories that have found no acceptance in Pennsylvania for more than fifty years, should not, it is submitted, be allowed to succeed. Compare *Reddington v. Philad. Traction Co.*, 132 Pa. 154, 19 Atl. 28 (1890).

The *Johnson* case in 1872, the *Kilgore* case in 1858, the *Lyons* case in 1889, the *Peters* case in 1887, like the *Webster* case in 1884, all relied on by the petitioner in her brief (pp. 20-21), not only involve factual situations fundamentally different from the facts of this case and therefore could not control it, but the principles considered in them were abandoned long ago and definitely rejected in the more recent cases above considered.

B. *There was no emergency.*

There was no sudden emergency or peril which might have relieved O'Daniel from the consequences of his careless conduct, as argued by petitioner (pp. 18 & ff.). The

situation which confronted him when he stood waiting for the steps of the car to come to him was one which he had anticipated and had an opportunity to consider from the time he first broke into a run approximately 100 feet from the train, and it is absurd to call the natural consequence of his deliberate act an "emergency." Moreover, even if it could be so described, the situation was the result of a voluntary choice on his part and hence his contributory negligence in placing himself in such a position precludes the petitioner, under Pennsylvania law, from availing herself of that doctrine. *Montgomery et ux. v. Philadelphia,* 270 Pa. 346, 113 Atl. 357 (1921); *Smith v. Lehigh Valley Transit Co.,* 296 Pa. 212, 145 Atl. 818 (1929); *Schiele et al. v. Motor Freight Express Inc., et al.,* 348 Pa. 525, 36 A. (2d) 467 (1944).

Conclusion.

It is accordingly submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 382-383 October Term, 1947.

JESSIE L. O'DANIEL,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Respondent,

JESSIE L. O'DANIEL, Executrix of the Will of WILLIAM BRYAN O'DANIEL, deceased,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner files this Reply Brief for the purpose of correcting the mistaken statements and inferences of fact and erroneous references to principles of law contained in Respondent's Brief in Opposition to the Petition for Certiorari.

MISTAKES OF STATEMENT.

(1)

Respondent's Reply Brief, bottom of page 3 states:

> "There was *no evidence* that O'Daniel, in his diagonal run across the driveway to the southeast corner of the station building, *was visible* to any member of the train *crew*, nor was there any evidence that any of the crew *was in a position to see him* when the signal to start the train was given by sounding the starting whistle, *which is done either from the platform or from the inside of the car*. When the starting whistle sounded O'Daniel had just reached the south edge of the station platform (R. 14a)."

The civil engineer, James J. Boyd, testified that the entire space between the curb at the Pennsylvania Building on Cricket Avenue, from which point the Decedent ran diagonally toward the South curb of the station platform, and the width of the platform over which he moved in a direct line toward the train standing at rest, were all unobstructed to the full view of the train crew (8a).

> "Q. Is there a driveway running south on the edge of the platform?

A. Yes, there is a driveway paralleling, which connects with Cricket Avenue and Anderson Avenue.

Q. How wide is that driveway?

* * * * * * *

THE WITNESS: The total width across there is 73 feet.

BY MR. WRIGHT:

Q. Is that driveway in between the platform and the other side of the driveway, it is unobstructed?

A. That is right."

Mr. Boyd further testifies as follows (9a):

"Q. Can you give us the distance from the platform at the east end of the station to the end of the platform?

THE COURT: East end of station to east end of platform?

MR. WRIGHT: Yes, that is right.

THE WITNESS: That is on the Philadelphia end of the platform, 97 feet."

On pages 10a and 11a, he says:

"Q. Is that all unobstructed?

A. Yes, sir, with the exception of the supporting colums for the overhead canopy, or roof.

Q. How much are those columns?

A. Approximately six inches through.

* * * * * * *

Q. Mr. Boyd, from the south side of the platform across the driveway to the pavement surrounding the bank building there, what is that distance?

A. The right angle distance or the diagonal distance from the corner of the station.

Q. The diagonal distance.

MR. PRICE: The diagonal distance to what point?
THE COURT: The south side of the platform.
MR. WRIGHT: To the curb of the Pennsylvania Building there, the bank building.
MR. PRICE: He said at right angles. I want to know what point he is starting at to begin the diagonal.
THE WITNESS: From the corner of the sidewalk, that is the radius curb at the Pennsylvania Building, heading in a northeasterly direction to the Philadelphia end of the waiting room, to the curb in that vicinity, that is diagonally across the street.
BY THE COURT:
Q. How far is that?
A. That is 91 feet."

The witness, Miss Vaux, testified as follows (17a):

"Q. Miss Vaux, is there not a clear and an unobstructed view of the platform at Ardmore station from the platform?
A. You mean from the train ——
Q. From the edge of the platform to the edge of the platform where the rail is?
A. Oh, yes."

This evidence is conclusive the trainmen must have seen the Decedent traversing the whole open space from the time he entered the railroad premises, following the direct path which all intending passengers take from Cricket Avenue to a standing train at the station. It is respectfully suggested that on the question of Respondent's negligence it is the province alone of the jury to find whether the trainmen did not look for either approaching or standing passengers before giving the signal; or, seeing Decedent approaching the train, gave the signal in disregard of their duty; or, seeing him standing beside the train, started it; and particularly, whether, under all of the circumstances, Respondent

owed to the Decedent, as an intending passenger, any duty under tests as defined by the Court's instructions to it.

The record is barren of any evidence warranting Respondent's statement that: "The starting whistle, which is done either from the platform or from the inside of the car". It is suggested the manner of giving the starting signal is immaterial; but the conclusion is irrefutable that the whistle was sounded with the Decedent, as an intending passenger, in full unobstructed view of the crew, *when he was only twenty (20) feet from the standing train and that it was started while he was standing along side of the train only ten (10) feet from the car steps;* and that Respondent's violation of its duty to Decedent could be found by the jury under proper instructions by the Court.

(2)

Respondent says in the same paragraph at the bottom of page three of its Reply Brief:

> "The station building, from behind which O'Daniel *suddenly emerged on the south edge of the station platform just as the starting whistle sounded, was 48 feet long* (R. 9a) *and effectively screened him from anyone standing beside the train on the north side of the platform.*"

The Decedent did not suddenly come from behind the station building, nor could it screen him from the trainmen if standing along the North side of the station platform. The station building is only forty-eight (48) feet in length, but the station platform where passengers boarded the train is three hundred and thirty (330) feet long, and the distance from the East end of the station building to the East end of the station platform is ninety-seven (97) feet.

The testimony of the civil engineer, James J. Boyd, as to

the length of the station building and of the station platform follows (7a and 9a):

"Q. Will you tell me the length of the station platform?

A. Do you want the length in accordance with this plan? That is what you want?

* * * * * * *

THE WITNESS: 330 feet."

"BY THE COURT:

Q. What is the length and width of the station?

* * * * * * *

A. Forty-eight by nine and a half."

The Decedent approached the standing train from the curb at the end of the Pennsylvania Building, not in a straight line, but in a *diagonal* line; and, therefore, could not have suddenly appeared from behind the station building, but must have been in full view of the trainmen, if looking in the direction from which passengers approach to board the train. The Decedent's diagonal flat-footed run to the station platform was made at all times in full and unobstructed view of the trainmen. But two conclusions can be drawn—(a) Decedent approached the station platform from the street as the *shortest diagonal distance* and (b) from that point he moved in a *direct straight line*, at right angles to the rails where the train was standing at rest. The trainmen, if they had performed their duty in looking in the direction approaching passengers would take, must have seen the Decedent. Certainly the Court may not conclude as law and the jury, on any facts in evidence, would not be warranted in finding as fact that Decedent suddenly emerged from any "screened" place that obstructed the clear view of the trainmen.

(3)

Respondent says, on page four:

> "Petitioner likewise failed to show accurately how far the train moved before O'Daniel tried to board it and how far his 'couple of steps' (R. 25a, 26a, 27a) took him alongside the train before he fell."

If there is one thing established to certainty, it is the distance the car had moved at the time the Decedent attempted to board it. Miss Vaux testified the rear platform of the car, which the Decedent attempted to board, stopped at approximately ten (10) feet from the East end of the station building and that the Decedent attempted to board this platform when it was on a line with the East end of the station building.

Above all, the following colloquy between the Trial Judge and one of the counsel for Petitioner, on motion made to call Miss Vaux for the purpose of having the record in accord with that fact, precludes even a suggestion being made as to any uncertainty or inaccuracy about the distance the car moved (45a, 46a).

> "MR. DICKERSON: 'How far from the east end of the station building did that rear platform stop?' *She said, ten feet.*
>
> THE COURT: *Yes.*
>
> MR. DICKERSON: That is what we are contending.
>
> THE COURT: Then, what do you want?
>
> * * * * * * *
>
> MR. DICKERSON: Pardon me, Your Honor, the witness has testified that the distance from *the rear end of the third car, from which she alighted, to the east end of the platform, is ten feet.*
>
> THE COURT: *Yes, certainly.*
>
> MR. DICKERSON: She further testified that the

decedent ran along in a straight line at the east end of the station *and went directly to the north edge of the platform, and stood at that point until the steps, to which she has just referred, came opposite him.*

THE COURT: *Yes.*

MR. DICKERSON: *And that is the distance which the car moved, according to her testimony, when he attempted to board the car.*"

The above colloquy occurred after counsel for the Petitioner stated that (42a):

"MR. VALE: May it please the Court, before Your Honor rules on the motion made by counsel for the defendant to dismiss, I wish to make a motion on behalf of the plaintiff, that the plaintiff be accorded the privilege of reopening her case for the purpose of calling a witness, Miss Vaux, who is now in court, to supply certain testimony which she gave while on the stand, and which, by inadvertence by the stenographer, is omitted from his notes."

The official stenographer then, for the first time, read from his notes the testimony of Miss Vaux as follows (45a):

"Q. How far from the east end of the station building did that rear platform stop?

A. Approximately ten feet."

Whereupon counsel for Petitioner advised the Court (46a):

"MR. VALE: If that is in the record, may it please the Court, and there is no misunderstanding as to that.

THE COURT: I do not think there is any misunderstanding.

MR. VALE: Then, that is the end of it."

(4) and (5)

Other erroneous statements are summarized as follows: There is neither (4) evidence that all passengers on the station platform had boarded the train before Decedent reached the station platform; nor

(5) Presumption that the starting signal was heard by Decedent—a question of fact to be determined by the jury. See in this connection: ~~To be listed in Table Cases~~. Pennsylvania Railroad Company vs. Werner ((1879) 89 Pa. 59).

ERRORS IN ARGUMENT.

Respondent's erroneous statements and applications of principles of law should be corrected as to matters following:

(1)

Respondent on page five (5) of its Reply Brief refers to MacGregor vs. State Mutual Life Assurance Company of Worcester, Mass. ((1941) 315 U. S. 280, 86 L. ed. 846), to support its suggestion that because the Trial Judge and two of the Circuit Judges below had experience at the Pennsylvania Bar, the judgment should not be disturbed. Respondent, however, does not refer to the irrefutable reason the MacGregor judgment was left undisturbed, for this Honorable Court tersely distinguished the facts in that case from the instant case by stating at page 281:

> *"No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention."*

There is no Pennsylvania case that conceptually applies the assumed absolute which both the Trial Court and the

Circuit Court made decisive in the instant case. The cases cited by the Trial Court in its opinion and by Respondent in its Reply, as therein it now admits, *are but dicta.* Every case referred to by Respondent makes *all* of the circumstances attending the particular injury determinative of liability, where the train was just starting and speed was negligible or was not definitely fixed by indubitable testimony at four or more miles per hour.

The Johnson Case and precedents relied on by Petitioner demonstrate the applicability of the principles therein stated as conclusive of the Trial Court's error in the instant Petition.

(2)

On page six (6) of Respondent's Brief, it now is frankly admitted that in order to sustain the conceptualistic interpretation of negligence per se, it must in part, at least, rely on *"the court's dictum"*.

As was pointed out in Petitioner's Brief at pages seventeen (17) and eighteen (18), every case relied upon by the Court below and differentiated in the Petition discloses a factual basis showing: (a) speed in excess of three or four miles per hour, (b) proximate cause of injury was the sole act of the injured party, and (c) undisputed facts from which only one inference of contributory negligence could be drawn. Not a case cited by the Court or Respondent of negligence per se concluded as law against a decedent's attempt to board a train just starting and moving at so negligible speed no witness attempted to guess.

(3)

Respondent's Reply Brief on page seven (7) quotes a short excerpt from the dissent of Mr. Justice Mestrezat in the Hunterson Pennsylvania Case. A most casual reading

of this case will disclose that it announces the law and supporting reasons as here contended by the Petitioner. The excerpt quoted by the Respondent only states that injury of which plaintiff's negligence is the sole proximate cause precludes recovery, regardless of speed. The excerpts from the dissenting opinion in confirmation of Petitioner's contention follow:

At page 573:

> "It will be observed that the testimony is somewhat conflicting as to the rate of speed at which the car was travelling when the plaintiff attempted to board it. The jury would have been *justified in finding that the car was moving slowly and had almost absolutely stopped.* It was not for the court to resolve the apparently conflicting statements of the witnesses as to the speed of the car at the time the plaintiff attempted to enter it. That was for the jury."

On page 574, the learned Justice says:

> *"In my judgment, it is not negligence per se to board a moving train";*

and finally, on page 576, the reasons in support of that conclusion are stated:

> "A reasonably prudent man would not attempt to get on or off a rapidly moving street car as the danger would be apparent, and if he did so his act would convict him of negligence; but should he enter or alight from a car almost at rest, the circumstances would be different, and the character of his act must be determined in the light of those circumstances. *In the former, the rapidity of the car would make the danger apparent to the dullest intellect; in the latter, the speed of the car would raise no doubt in the mind of a prudent man that he could accomplish the act with safety.*
>
> *The position of the majority of the court is not sup-*

ported by any decision in this state. On the contrary, the authorities not only of this but of other states, sustain the view herein stated."

(4)

Respondent's Reply Brief, page nine (9) states there was no emergency; but that Decedent's peril resulted from a voluntary choice. This contention is no answer to the principles announced and applied in the Johnson Case and in other Pennsylvania and Federal cases which follow it. Respondent's cited precedents involve the principle of *peril based upon factual situations wherein the Petitioner voluntarily placed himself in a hazardous position*, and where the proximate cause of injury solely resulted from his acts.

(5)

On page nine (9) of its Reply Brief, Respondent complains and now suggests Petitioner should not have exercised her legal right to sue in a Federal court, and referring to the Pennsylvania case of Reddington vs. Philad. Traction Company ((1890) 132 Pa. 154), contends Petitioner basis her argument in support of the issues involved on theories a half century old. Both the lower and appellate court emphasized as controlling the fact that Reddington, having disabled himself by attempting to get on the car *with his left arm and hand encumbered with his coat and dinner bucket*, he had *thus prevented himself from doing what he might otherwise have done without being charged with carelessness.* On page 115, the Trial Judge says:

> "If he could have taken hold of the upright with his left hand, then, in all probability, he would not have been thrown off as he was. *It was the disabling of himself which prevented him from doing, under the circumstances, what he otherwise might have done.*"

(6)

The opening sentence of Respondent's argument (page 5) suggests: "No federal question is raised by the petition". The succeeding sentences of the argument make clear, however, that it is the Court's departure from the usual course of Federal procedure which requires this Honorable Court to exercise its appellate supervision. The principles referred to and the cases wherein they were applied are discussed on pages six (6) and seven (7) of the Petition and on pages nine (9), eleven (11), twelve (12); twenty-nine (29) to thirty-six (36); forty-one (41) to forty-four (44) of the argument, with particular reference to the meaning of and the respective functions of judges and juries under Rule 50 of the Federal Rules of Civil Procedure.

All of which is respectfully submitted.

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